

**United States Department of Labor
Employees' Compensation Appeals Board**

C.N., Appellant

and

U.S. POSTAL SERVICE, NORTHERN OHIO
PERFORMANCE CLUSTER, Cleveland, OH,
Employer

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Docket No. 12-1224
Issued: November 8, 2012

Appearances:

Alan J. Shapiro, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 15, 2012 appellant, through his representative, filed timely appeals from April 16, 2012 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish that he has more than a 19 percent permanent impairment of his left leg; (2) whether he received a \$13,584.24 overpayment of compensation; and (3) whether OWCP abused its discretion by refusing to waive recovery of the overpayment.

¹ 5 U.S.C. §§ 8101-8193.

FACTUAL HISTORY

OWCP accepted that on March 6, 2003 appellant, then a 48-year-old mechanic, sustained a left knee strain, left knee contusion, lumbar strain/sprain and left elbow contusion due to a falling on ice and snow at work.² It also accepted that on August 25, 2003 he sustained a lumbar strain and lumbar disc herniations when he straightened up after having worked under the dashboard of his work vehicle.³

In an August 3, 1991 report, Dr. Raul de la Iglesia, an attending osteopath, determined that appellant had eight percent permanent impairment of his left leg under the standards of the revised third edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (rev. 3rd ed. 1991). In a December 6, 1991 decision, OWCP granted appellant a schedule award for an eight percent permanent impairment of his left leg. The award ran for 23.04 weeks from September 21, 1991 to February 29, 1992.

On November 19, 2005 OWCP's medical adviser evaluated the findings of Dr. Timothy Morley, an attending osteopath, to determine that appellant's limited left leg range of motion equaled a 19 percent permanent impairment under the standards of the fifth edition of the A.M.A., *Guides* (5th ed. 2001). In a January 6, 2006 decision, OWCP granted appellant a schedule award for a 19 percent permanent impairment of his left leg. The award ran for 54.72 weeks from June 1, 2005 to June 19, 2006. When OWCP granted the January 6, 2006 schedule award for a 19 percent left leg impairment, it neglected to subtract the eight percent schedule award for the left leg previously granted on December 6, 1991.⁴

Appellant claimed entitlement to increased schedule award compensation due to his work injuries. In a December 13, 2009 report, Dr. William Grant, an attending Board-certified internist, described appellant's medical history and detailed the findings of his physical examination including range of back motion. He concluded that appellant had 32 percent whole person impairment.

In an August 25, 2010 report, Dr. Brian M. Tonne, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, stated that Dr. Grant did not provide a rating of appellant's impairment in accordance with the sixth edition of the A.M.A., *Guides* (6th ed. 2009). He stated that the tables referenced by Dr. Grant did not appear on the pages in the sixth edition of the A.M.A., *Guides* that he ostensibly cited. Dr. Tonne noted that Dr. Grant provided a whole person impairment based on spinal pathology, but pointed out that impairment ratings for the whole person or of the back itself were not compensable. He discussed the methods for rating back conditions which caused impairment in the lower extremities. Dr. Tonne recommended that

² On May 2, 2002 appellant sustained a lower back injury due to lifting a tire onto the back of a tow truck. The claim was considered to be an administrative quick closure with limited medical expenses authorized.

³ OWCP had previously accepted that on July 13, 1988 appellant sustained contusions and strains/sprains of his neck, back, left leg, left knee and left shoulder and a medial meniscus tear in his left knee. On February 27, 1989 appellant underwent a left partial meniscectomy which was authorized by OWCP.

⁴ In an October 25, 2011 letter, OWCP advised appellant of its preliminary determination that he received a \$13,584.24 overpayment of compensation due to OWCP's failure to subtract the eight percent previously awarded.

Dr. Grant be asked to provide clarification of his report or that an opinion on appellant's permanent impairment be obtained from another physician.

In a June 9, 2011 letter, OWCP asked Dr. Grant to clarify his rating of appellant's permanent impairment under the standards of the sixth edition of the A.M.A., *Guides*. It provided him until August 11, 2011 to respond; but he did not respond within the allotted time.

In August 2011, OWCP referred appellant to Dr. Robert J. Nickodem, a Board-certified orthopedic surgeon, for a second opinion examination and an opinion on the permanent impairment of left leg under the sixth edition of the A.M.A., *Guides*.

In a September 13, 2011 report, Dr. Nickodem provided results on examination. He stated that, using Table 16-23 on page 549 of the sixth edition of the A.M.A., *Guides*, appellant had 10 percent impairment of the left knee based on seven degrees of flexion contracture. Flexion to 120 degrees was a 0 percent impairment and therefore there was a 10 percent impairment of the left knee under Table 16-3. Dr. Nickodem stated that, using Table 16-25 on page 550, the range of motion International Classification of Functioning (ICF), disability and health score would be 1. Using Table 16-6 on page 516, the functional history adjustment would be grade 2 based on the AAOS score of 60. Using Table 16-17 on page 545, the functional history net modifier would be 1 because the functional history of 2 minus range of motion class 1 would be a net adjustment of 1, and therefore there would be a 5 percent increase above the 10 percent impairment. This calculation gave appellant a total left leg impairment of 10.5 percent, which rounded up to 11 percent. Dr. Nickodem concluded:

"Therefore, it is my opinion that the claimant has an 11 percent impairment of the left lower extremity due to the allowed diagnosis of left medial meniscus tear. There is no ratable impairment in the right lower extremity and there is no ratable impairment in the left lower extremity based on the allowed conditions for [appellant's] lumbar spine of either lumbar sprain, back sprain/strain or contusion or lumbar disc herniation."

On October 13, 2011 Dr. Tonne reviewed the September 13, 2011 report of Dr. Nickodem. He agreed with Dr. Nickodem's assessment that appellant's accepted lumbar conditions were not ratable due to the absence of any radiculopathy to the lower extremities. Dr. Tonne noted that appellant's only ratable condition was his left medial meniscus tear. Using Table 16-23 on page 549 of the sixth edition of the A.M.A., *Guides*, appellant's seven degrees of flexion contracture in his left knee equaled a 10 percent impairment of his left leg. His 120 degrees of left knee flexion equaled a zero percent impairment. Dr. Tonne noted that, using Table 16-17 on page 545, the functional history modifier was 1 and therefore there was a 5 percent increase of the 10 percent impairment. This would equal a 10.5 percent impairment, which when rounded up equaled an 11 percent permanent impairment of appellant's left leg.

In an October 24, 2011 decision, OWCP denied appellant's claim for increased schedule award compensation finding that the weight of the medical evidence rested with the opinions of Dr. Nickodem and Dr. Tonne.

In an October 25, 2011 letter, OWCP advised appellant of its preliminary determination that he received a \$13,584.24 overpayment of compensation because he was paid a schedule

award for a 19 percent impairment of his left leg on January 6, 2006 without deducting the 8 percent left leg impairment previously received on December 6, 1991. It also made a preliminary determination that he was not at fault in creation of the overpayment. Appellant was provided 30 days to submit evidence and argument challenging the overpayment and was directed to complete and submit an attached financial overpayment questionnaire. He was advised that failure to submit the requested information within 30 days would result in denial of waiver of overpayment recovery.⁵

Appellant requested a telephonic hearing with an OWCP hearing representative. During the February 7, 2012 hearing, he asserted that there was a conflict in the medical opinion between Dr. Grant and Dr. Nickodem regarding the extent of his left leg impairment which required referral of the case to an impartial medical specialist. Appellant stated that he had enough assets to pay back the overpayment and indicated, that if necessary, he would pay it back.

In an April 16, 2012 decision, OWCP's hearing representative affirmed the October 24, 2011 decision denying an increased schedule award. He found that the weight of the medical evidence rested with the opinions of Dr. Nickodem and Dr. Tonne.

In another April 16, 2012 decision, OWCP's hearing representative finalized the preliminary determination that appellant received a \$13,584.24 overpayment of compensation. He determined that the overpayment was not subject to waiver because appellant did not submit the requested financial information.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of FECA⁶ and its implementing regulations⁷ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The A.M.A., *Guides* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.⁸ The effective date of the sixth edition of the A.M.A., *Guides* is May 1, 2009.⁹

⁵ The record contains evidence showing that appellant received \$32,006.16 in schedule award compensation for his left leg impairment. However, when accounting for the monies from the December 6, 1991 award (8 percent left leg impairment) that should have been deducted from the amount received in connection with the January 6, 2006 award (19 percent left leg impairment), appellant was only entitled to receive \$18,421.92.

⁶ 5 U.S.C. § 8107.

⁷ 20 C.F.R. § 10.404 (1999).

⁸ *Id.*

⁹ FECA Bulletin No. 09-03 (issued March 15, 2009).

Table 16-22 on page 549 of the sixth edition of the A.M.A., *Guides* describes impairment ratings for limited flexion and flexion contracture of the knee. Depending on the severity of the observed condition, adjustments based on functional history might be made to the impairment values obtained from Table 16-22.¹⁰

A schedule award is not payable for the loss or loss of use, of a part of the body that is not specifically enumerated under FECA. Neither FECA nor its implementing regulations provides for a schedule award for impairment to the back or to the body as a whole. Furthermore, the back is specifically excluded from the definition of organ under FECA.¹¹

ANALYSIS -- ISSUE 1

OWCP accepted that appellant sustained several injuries between 1988 and 2003 to his back and left leg, including a medial meniscus tear in his left knee, lumbar disc herniations and multiple contusions and strains/sprains of his low back, left knee and left leg.¹² It determined that he had 19 percent permanent impairment of his left leg and he later claimed entitlement to increased schedule award compensation. OWCP based its determination that appellant did not have more than 19 percent impairment of his left leg on the opinions of Dr. Nickodem, a Board-certified orthopedic surgeon who served as an OWCP referral physician, and Dr. Tonne, a Board-certified orthopedic surgeon who served as an OWCP medical adviser.

The Board finds that OWCP properly relied on the opinions of Dr. Nickodem and Dr. Tonne in determining that appellant did not have more than 19 percent impairment of his left leg and that he was not entitled to additional schedule award compensation.

In a September 13, 2011 report, Dr. Nickodem stated that the physical examination revealed normal motor, sensory and reflex examinations in both upper and lower extremity examinations. He properly found that the only allowed condition in the lower extremities was the left medial meniscus tear. For the diagnoses of lumbar disc herniations, lumbar strains/sprains and lumbar contusions, Dr. Nickodem indicated that there is no rating in either lower extremity based on those diagnoses because there was no radiculopathy. He correctly stated that, using Table 16-23 on page 549 of the sixth edition of the A.M.A., *Guides*, appellant had a 10 percent impairment of the left knee based on a seven degrees of flexion contracture.¹³ Dr. Nickodem noted that, using Table 16-25 on page 550, the range of motion ICF score would be 1. Using Table 16-6 and Table 16-17 on pages 516 and 545, the functional history adjustment calculation dictated that there would be a 5 percent increase above the 10 percent impairment. This calculation gave appellant a total left leg impairment of 10.5 percent, which rounded up to 11 percent.

¹⁰ See A.M.A., *Guides* 515, 545, 550, Table 16-5, Table 16-17 and Table 16-25.

¹¹ *James E. Mills*, 43 ECAB 215, 219 (1991); *James E. Jenkins*, 39 ECAB 860, 866 (1990).

¹² On February 27, 1989 appellant underwent a left partial meniscectomy which was authorized by OWCP.

¹³ Flexion to 120 degrees was a 0 percent impairment and therefore there was a 10 percent impairment of the left knee under Table 16-3. See A.M.A., *Guides* 540, Table 16-23.

On October 13, 2011 Dr. Tonne reviewed the September 13, 2011 report of Dr. Nickodem and agreed that appellant's accepted lumbar conditions were not ratable due to the absence of any radiculopathy to the lower extremities. He found that appellant's only ratable condition was his left medial meniscus tear. Dr. Tonne then applied the standards of the sixth edition of the A.M.A., *Guides* in the same manner as Dr. Nickodem and concluded that appellant had 11 percent permanent impairment of his left leg.

Appellant contends that there was a conflict in the medical opinion evidence between Dr. Grant, an attending Board-certified internist, and Dr. Nickodem regarding the extent of his left leg impairment which required referral of the case to an impartial medical specialist. Dr. Tonne properly pointed out on August 25, 2010 that Dr. Grant's impairment rating of 32 percent (contained in a December 13, 2009 report) was not based on the sixth edition of the A.M.A., *Guides* and impermissibly provided impairment ratings for the whole person and back itself.¹⁴ For this reason, the Board finds that the weight of medical evidence rests with Dr. Nickodem and Dr. Tonne.

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

LEGAL PRECEDENT -- ISSUE 2

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty.¹⁵ Section 8129(a) of FECA provides, in pertinent part:

“When an overpayment has been made to an individual under this subchapter because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which an individual is entitled.”¹⁶

Section 8116(a) of FECA provides that while an employee is receiving compensation or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, the employee may not receive salary, pay or remuneration of any type from the United States, except in limited specified instances.¹⁷

ANALYSIS -- ISSUE 2

The Board finds that appellant received a \$13,584.24 overpayment of compensation. Appellant received a schedule award for a 19 percent impairment of his left leg on

¹⁴ See *supra* note 10.

¹⁵ 5 U.S.C. § 8102(a).

¹⁶ *Id.* at § 8129(a).

¹⁷ *Id.* at § 8116(a).

January 6, 2006. OWCP failed to deduct the award he previously received for an eight percent impairment of his left leg on December 6, 1991. The record contains evidence showing that appellant received \$32,006.16 in schedule award compensation for his left leg impairment. However, when accounting for the December 6, 1991 award (8 percent left leg impairment) that should have been deducted from the January 6, 2006 award (19 percent left leg impairment), he was only entitled to receive \$18,421.92. The difference represents an overpayment of \$13,584.24. Appellant received a duplicative payment in 2006 for the same left leg impairment. For these reasons, OWCP properly determined that he received a \$13,584.24 overpayment.

LEGAL PRECEDENT -- ISSUE 3

The waiver or refusal to waive an overpayment of compensation by OWCP is a matter that rests within OWCP's discretion pursuant to statutory guidelines.¹⁸ These statutory guidelines are found in section 8129(b) of FECA which states: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."¹⁹ Since OWCP found appellant to be without fault in the matter of the overpayment, then, in accordance with section 8129(b), OWCP may only recover the overpayment if it determined that recovery of the overpayment would neither defeat the purpose of FECA nor be against equity and good conscience.

Section 10.438 of OWCP's regulations provide:

"(a) The individual who received the overpayment is responsible for providing information about income, expenses and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. This information will also be used to determine the repayment schedule, if necessary.

"(b) Failure to submit the requested information within 30 days of the request shall result in denial of waiver and no further request for waiver shall be considered until the requested information is furnished."²⁰

ANALYSIS -- ISSUE 3

OWCP properly determined that appellant did not establish entitlement to waiver of the overpayment under the above-described standards. Appellant did not provide the requested financial information within the appropriate time period to show that he was entitled to waiver of the overpayment. Therefore, OWCP properly denied waiver of overpayment recovery.²¹

¹⁸ See *Robert Atchison*, 41 ECAB 83, 87 (1989).

¹⁹ 5 U.S.C. § 8129(b).

²⁰ 20 C.F.R. § 10.438.

²¹ See *id.*

CONCLUSION

The Board finds that appellant did not meet his burden of proof to establish that he has more than a 19 percent permanent impairment of his left leg, for which he received a schedule award. The Board further finds that he received a \$13,584.24 overpayment of compensation and that OWCP did not abuse its discretion by refusing to waive recovery of the overpayment.

ORDER

IT IS HEREBY ORDERED THAT the April 16, 2012 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: November 8, 2012
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board